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**80-1386**

**NO.**

IN THE
**Supreme Court of the United States**

**OCTOBER TERM, 1980**

EDMUND FRENCH,

*Petitioner,*

-against-

THE PEOPLE OF THE STATE OF NEW YORK,

*Respondent.*

# PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION, SECOND DEPARTMENT OF THE SUPREME COURT OF THE STATE OF NEW YORK

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## QUESTIONS PRESENTED

1. Whether the petitioner was denied due process and equal protection under the law under the Fourteenth Amendment where the prosecution failed to make a complete pretrial disclosure of a statement made by the petitioner to a police officer as required by the Criminal Procedure Law of New York and then used the omitted portion of the statement at trial?

2. Whether the petitioner was denied due process and equal protection of the law when after failing to specify the evidence of a statement to an officer intended to be offered prior to trial the court allowed the omitted evidence to be admitted at trial without proof of good cause for failure to serve a complete notice as required by the Criminal Procedure Law of New York?

3. Whether the petitioner was denied due process and equal protection under the law when after failing to specify the evidence of a statement to an officer intended to be offered prior to trial the court allowed the omitted evidence to be admitted at trial without requiring the prosecution to serve such belated notice of intent to offer the evidence as required by the Criminal Procedure Law of New York?

## TABLE OF CONTENTS


| | *Page* |
|---|---|
| Questions Presented | i |
| Table of Contents | iii |
| Opinions Below | 2 |
| Jurisdiction | 2 |
| Constitutional Provisions And Statutes Involved | 3 |
| Statement of the Case | 3 |
| Reasons for Granting the Writ: | |
| By Failing To Disclose And Give Notice Of The Admission Concerning The Finding Of The Gun The People Deprived The Petitioner Of A Fair Trial. | 5 |
| Conclusion | 8 |


## INDEX TO APPENDICES


| | |
|---|---|
| A—Certificate Denying Leave | 1a |
| B—Section 710.30 of the Criminal Procedure Law of the State of New York | 3a |
| C—Excerpts from Transcript of Testimony | 4a |
| D—Excerpts from Transcript of Testimony | 8a |
| E—Excerpt from Summation | 10a |


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## CASES CITED

*Chambers v. Florida,* 309 U.S. 227 ..... 7

*Griffin v. Illinois,* 351 U.S. 12 ..... 7

*Loper v. Beto,* 440 F. 2d 934 (5th Cir. 1971) rev on other grounds 405 U.S. 473 (1972) ..... 8

*Miranda v. Arizona,* 384 U.S. 436 ..... 7

*People v. Barrie,* 74 AD 2d 576 ..... 6

*People v. Briggs,* 38 N.Y. 2d 319, 324 ..... 6

*People v. Greer,* 42 NY 2d 170 ..... 5

*People v. Iveys,* 67 A.D. 2d 349 ..... 5

*People v. Spruill,* 47 NY2d 869 ..... 6

*People v. Wise,* 46 NY2d 321 ..... 7

*Yick Yo v. Hopkins,* 118 U.S. 356 ..... 7

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**PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION, SECOND DEPARTMENT OF THE SUPREME COURT OF THE STATE OF NEW YORK**

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To the Honorable The Chief Justice, and Associate Justices of the Supreme Court of the United States:

Edmund French, petitioner herein, respectfully prays that a writ of certiorari be issued to review the judgment of the Appellate Division, Second Department, of the New York State Supreme Court which affirmed a judgment of the Supreme Court, Richmond County, convicting the petitioner of the crime of assault in the first degree under Section 120.10 of the New York State Penal Law. The New York State Court of Appeals has denied petitioner leave to appeal to that court and petitioner has exhausted all of his state remedies.

## OPINIONS BELOW

The opinion of the Appellate Division, Second Department, of the Supreme Court of the State of New York affirming petitioner's conviction and the Order of the Honorable Jacob D. Fuchsberg, Judge of the New York Court of Appeals, denying leave to appeal to that court are as yet officially unreported. Copies of said opinions, however, are made a part hereof and are set forth in Appendix A.

## JURISDICTION

The judgment of the Appellate Division, Second Department, of the Supreme Court, State of New York reaffirming petitioner's judgment of conviction was entered on December 1, 1980. Application for leave to appeal to the New York State Court of Appeals was denied on December 18, 1980. The jurisdiction of this court is invoked pursuant to Title 28 U.S.C., Section 1257(3).

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provision involved in this case is the Fourteenth Amendment to the United States Constitution. Section 710.30 of the Criminal Procedure Law of the St e of New York sets forth the procedures required of the people whenever they wish to introduce at a trial evidence of a statement made by a defendant to a public servant. (See Appendix B).

## STATEMENT OF THE CASE

Edmund French was indicted for Assault in the First Degree and Criminal Possession of Weapon in the Second Degree (a loaded pistol) and was so convicted after trial by jury. At sentence the weapons charge was dismissed and a mandatory minimum sentence of one and one-half years to four years was imposed for the assault charge.

Mr. French was the manager of a bar near his home. His nephew, Robert Schnell, came to the bar shortly after midnight on August 26, 1979 despite having been told by the petitioner to stay away. Schnell was ejected after throwing a glass. He was beaten in the process. He was, by his own admission, very drunk.

At 4:00 A.M. Schnell, together with a brother who came to his home from another part of the City at his request after the bar room incident, met the petitioner outside the petitioner's home.

According to the testimony of John Schnell they were walking to a car and had no weapons when they saw the petitioner and his wife in front of their home seated in lawn chairs. Both claimed they were unarmed. The brother said that Robert Schnell and the petitioner confronted each other and that the petitioner shot him from a distance of 15 to 20 feet. The petitioner and his wife

testified that both Schnell brothers ran toward them with Robert threatening to blow petitioner's head off. Robert had a hand gun and his brother had a tire iron or pipe. The petitioner stated that he wrested the gun from Robert and shot him in self defense.

The prosecution prior to trial served a written notice pursuant to Criminal Procedure Law Section 710.30 (Appendix B) stating that the petitioner had made the following admission to Police Officer O'Halloran:

> "Defendant stated Schnell was his nephew. They had been arguing off and on for 6 months. Schnell had been harassing him and his wife. He couldn't take the harassment any longer so he shot Schnell."

The defense made no pre-trial motion to suppress the foregoing statement. At the trial on the direct case, the police officer testified to the disclosed statement and then added that when asked where he got the gun the petitioner responded that "he found it". This was objected to and the jury was instructed to disregard the testimony concerning French's finding of the gun. The record reveals that the court excluded the admission of finding the gun because the people failed to include it in the written notice. (Pages 208-213 Record on Appeal Appendix C)

The People called Police Officer O'Halloran in rebuttal and, over objection, he testified that the petitioner told him that he (the petitioner) found the gun. The People offered no proof as to good cause for failing to give notice of this admission. The People offered no written notice of their intent to offer this additional admission in advance of the actual testimony. (Pages 573-575 Record on Appeal Appendix D).

## REASONS FOR GRANTING THE WRIT

### BY FAILING TO DISCLOSE AND GIVE NOTICE OF THE ADMISSION CONCERNING THE FINDING OF THE GUN THE PEOPLE DEPRIVED THE PETITIONER OF A FAIR TRIAL.

There is no doubt that the notice referred to in CPL Section 710.30 is a written notice (*People v. Iveys,* 67 A.D. 2d 349). In *People v. Greer,* 42 NY 2d 170 the Court of Appeals dealt with a remarkably similar case. In *Greer* the defendant charged with rape admitted the intercourse claiming consent and prior intimacies with her. The deficient notice omitted the inculpatory statement that he did not know the woman's name. The Court ruled that in the context of the case with the admissions of intercourse and claimed consent that the testimony that the defendant did not know the name of the woman was crucial. In the same way it was crucial whether a defendant who maintained he took the gun in a struggle should be charged with an admission of finding the gun when the People never gave notice of it.

The People never made any offer of proof as to "good cause" for their failure to include the admission of finding the weapon. The rebuttal testimony was introduced over the objection of the defense.

CPL Section 710.30 set forth in Appendix B, prescribes exactly what must be done by the People when they wish to offer a defendant's statement. The defendant must be served with a notice of intention specifying the evidence. The New York Courts have made it clear that this means a full and fair disclosure (*People v. Greer, supra.*).

The notice must be served within fifteen days after arraignment and before trial. The defendant must be afforded an opportunity to suppress such statement before trial.

The statute gave the People a chance to correct an error or omission in the notice "For good cause shown . . .". The People provided no proof whatsoever to establish good cause for their omission. Good cause cannot be presumed for the record is totally barren. Indeed since the testimony came from the arresting officer it would be difficult to visualize any circumstance under which the People could show good cause for the insufficient notice and the belated offer of a complete statement (*People v. Briggs,* 38 NY 2d 319, 324; *People v. Spruill,* 47 NY2d 869).

The statute further requires that if good cause can be established then and only then the Court may permit the people to serve a notice of a statement belatedly and then "must accord the defendant reasonable opportunity thereafter to make a suppression motion." No testimony was taken on the requirement of good cause and no subsequent notice of such intention to offer an admission in evidence was served.

The importance of Police Officer O'Halloran's rebuttal testimony cannot be gainsaid. The prosecution was able to expressly impeach the petitioner by a police officer. The Petitioner and his wife testified to their version. The complaining witness and his brother testified to their version and the principals were clearly in conflict. The admission to the Police Officer to the effect that the Petitioner had the gun prior to the confrontation gutted the defenses of self defense as to the assault and transitory possession as to the possession of a weapon. New York has ruled that the prosecution may not lay back and use damaging testimony to impeach without complying with CPL Section 710.30 (*People v. Barrie,* 74 AD 2d 576). The People cannot now contend that this was inconsequential. In summation the prosecutor called the admission of finding the gun the "most important piece of evidence in this case." (Page 743-745 Record on Appeal Appendix E). They deliberately introduced the evidence to bolster the Schnell

brothers and to impeach petitioner and his wife. Credibility was an issue in this case for the petitioner, a forty-eight year old man, had never been convicted of a crime and the complaining witness had a conviction for larceny.

Indeed the trial judge observed in initially excluding the admission about finding the gun that he ". . . was not sure that irrevocable harm hasn't been done already. Specifying the evidence, not the substance of the evidence, specifying the evidence." (Page 213 Record on Appeal Appendix C) Subsequently—the trial court, acting in reliance on *People v. Wise,* 46 NY2d 321, allowed the testimony of Police Officer O'Halloran to be introduced in rebuttal (Page 573 Record on Appeal Appendix D). *People v. Wise* stood for the proposition that admissions suppressed for failure to comply with *Miranda v. Arizona,* 384 U.S. 436 could be used to impeach a defendant witness. In *People v. Wise* a motion to suppress was made and there was no question of a defective or inadequate notice. In this case no motion to suppress was made and hence the People were obligated to give a complete and proper notice. To further exacerbate the matter the court failed to instruct the jury either at the time the testimony was given or in its charge that the officer's rebuttal was solely to impeach French's credibility and was not to be considered as tending to establish petitioner's complicity in the crime.

It has been continually held that constitutional guarantees of due process and equal protection call for procedures in criminal trials which allow no invidious discrimination between persons and different groups of persons. *Griffin v. Illinois,* 351 U.S. 12. In *Griffin, supra,* the Supreme Court citing *Chambers v. Florida,* 309 U.S. 227 and *Yick Yo v. Hopkins,* 118 U.S. 356, stressed that the central aim of our entire judicial system was that all persons charged with crimes must so far as the law is concerned stand on an equality before the bar of justice in

every American Court. It has been consistently held that criminal laws of the state must be applied equally to all defendants. The court in *Loper v. Beto,* 440 F.2d 934 (5th Cir. 1971), rev on other grounds 405 U.S. 473 (1972), stated at page 941:—

> "It is elemental that the right to equal protection under state law includes the right to be tried in the same manner as others accused of similar infractions."

The pertinance of this comment in this case is striking.

## CONCLUSION

**THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.**

Respectfully submitted,

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ANTHONY J. CRECCA
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## APPENDIX A—CERTIFICATE DENYING LEAVE

STATE OF NEW YORK
COURT OF APPEALS

BEFORE: HON. JACOB D. FUCHSBERG, Associate Judge

---

THE PEOPLE OF THE STATE OF NEW YORK

against

EDMUND FRENCH

---

I, JACOB D. FUCHSBERG, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,* there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied. Insufficient ground indicated for an oral hearing of this application.

Dated at New York, New York
December 18, 1980

s/ Jacob D. Fuchsberg
Associate Judge

*Description of Order: Order of the Appellate Division, Second Department dated December 2, 1980 affirming a judgment of the Supreme Court, Richmond County rendered May 21, 1980.

MILTON MOLLEN, P.J.
VITO J. TITONE
LEON D. LAZER
JOHN P. COHALAN, JR., JJ.

__ AD2d __

A—November 18, 1980

2684 E

The People, etc., respondent,
v Edmund French, appellant.
(Ind. No. 339/79)

Anthony J. Crecca, Staten Island, N.Y., for appellant.

Thomas R. Sullivan, District Attorney, Staten Island, N.Y. (George E. McVay of counsel), for respondent.

Judgment of the Supreme Court, Richmond County (BARLOW, J.), rendered May 29, 1980, affirmed (see *People v. Crimmins,* 36 NY2d 230).

This case is remitted to the Supreme Court, Richmond County, for further proceedings pursuant to CPL 460.50 (subd 5).

MOLLEN, P.J., TITONE, LAZER and COHALAN, JJ., concur.

December 1, 1980 PEOPLE v. FRENCH 2684E

## APPENDIX B—SECTION 710.30 OF THE CRIMINAL PROCEDURE LAW

*§710.30 Motion to Suppress Evidence; Notice to defendant of intention to offer evidence.*

1. Whenever the people intend to offer at trial (a) evidence of a statement made by a defendant to a public servant, which statement if involuntarily made would render the evidence thereof suppressible upon motion pursuant to subdivision three of section 710.20, or (b) testimony regarding an observation of the defendant either at the time or place of the commission of the offense or upon some other occasion relevant to the case, to be given by a witness who has previously identified him as such, they must serve upon the defendant a notice of such intention, specifying the evidence intended to be offered.

2. Such notice must be served within fifteen days after arraignment and before trial, and upon such service the defendant must be accorded reasonable opportunity to move before trial, pursuant to subdivision one of section 710.40, to suppress the specified evidence. For good cause shown, however, the court may permit the people to serve such notice thereafter and in such case it must accord the defendant reasonable opportunity thereafter to make a suppression motion.

3. In the absence of service of notice upon a defendant as prescribed in this section, no evidence of a kind specified in subdivision one may be received against him upon trial unless he has, despite the lack of such notice, moved to suppress such evidence and such motion has been denied and the evidence thereby rendered admissible as prescribed in subdivision two of section 710.70. As amended L.1976, c.8, §2; L. 1976, c.194, §3.

## APPENDIX C—EXCERPT FROM TRANSCRIPT OF TESTIMONY

Q. Tell the jury just what happened when you approached him.

A. I approached him and asked him what had happened, and he stated to me he just had an altercation with the complainant, and it's been an on-going dispute, more or less, for the last six months, and the complainant had been in his house that night, had an argument with his wife and destroyed some property. He says I just couldn't take it any more, I had an argument with him and I shot him.

Q. Did you further question—you further have any conversation with him?

A. Yes, I did.

Q. What did that involve?

A. I had asked him where the gun was.

Q. Did he respond?

A. No.

Q. What happened next?

A. A woman whom I now know, I believe it's his wife, Helen, directed Officer Zarrilli to his address, 216 Moreland Avenue.

Q. You mean the defendant's address?

A. Mr. French's address, and they had gone upstairs, and in a matter of seconds, they came out and Officer Zarrilli handed me a gun.

Q. What did you do with that gun?

A. I secured the gun in my pants pocket.

Q. What did you do with Mr. French, if anything?

A. I had asked Mr. French where he had got the gun.

Q. What did he tell you?

A. He said he found it.

MR. PETERSON: Objection, Judge.

THE COURT: You asked whom?

THE WITNESS: Defendant.

THE COURT: Overruled.

MR. PETERSON: May we have a side bar.

(Whereupon, a discussion was held off the record at the side bar outside the presence of the jury.)

MR. CRECCA: Judge, if the Court pleases, the defense will move to strike the testimony of this gentleman, especially the latter portion of same.

THE COURT: The entire testimony?

MR. CRECCA: The latter portion.

THE COURT: The question with regard to or the answer allegedly made by the defendant to the effect that he found the gun, that will be stricken, the jury is instructed to treat that answer as if it had never been given. It is not part of the evidence in this case.

CONTINUING DIRECT EXAMINATION

BY MR. O'SHEA:

Q. Officer O'Halloran, after you spoke to Mr. French, did there come a time when you arrested him?

A. Yes.

Q. What did you do with him physically?

A. I placed handcuffs on him and I put him in my radio car.

Q. And where did you go with him?

A. I then took him to the 120 Precinct for central booking.

Q. Did you have any conversation with Mr. French after you put him in the automobile?

A. Yes, I did.

Q. Tell the jury just what was said by you, what was said by the defendant.

THE COURT: Before you do that, let me see that notice again.

(Whereupon, a discussion was held off the record at the side bar outside the presence of the jury.)

THE COURT: We will take a short recess, I'm sorry to send you out so soon again. You may step out.

(Jury leaves the Courtroom).

THE COURT: Section 710.30 of the Criminal Procedure Law requires the People to serve a notice on the defense attorney within a certain time limit, 15 days after arraignment and before trial specifying the evidence intended to be offered. Now, let me see the 710.30 notice that was in fact given. I note that the phrase specifying the evidence doesn't read to me giving the substance of the evidence. It says specifying. The word specifying comes from specific, and to me means specific.

MR. O'SHEA: I think it is specific, of course, we have it in writing or in tape where we can give them, where we have an oral statement that goes on for some time, I don't think the statute requires that we give a verbatim statement of that.

THE COURT: I am sure the law, that the law will allow a little variation in language if it's oral, but not leaving out the only truly incriminating part of the statement.

Now, the substance of the statement which is set forth in the 710.30 notice served in this case says the defendant stated Schnell was his nephew, they had been arguing on and off for six months. Schnell had been harassing him and his wife. He couldn't take the harassment any longer, so he shot Schnell.

Then comes this extra thing that he was asked where he got the gun and he said he found it. Absolutely critical in a self-defense case, I would think.

Now, I understand that was included in the officer's notebook, a copy of which was delivered to the defense attorney after trial began. Correct?

MR. O'SHEA: That's correct. Which I think counsel was then on notice, and he could move if he so wished to suppress it, I think the statute allows it.

THE COURT: Well, that might be true, but he

didn't, and in any event, I am not going to allow any testimony as to any statement of this defendant except that which is set forth in the 710.30 notice. I am not sure that irrevocable harm hasn't been done already. Specifying the evidence, not the substance of the evidence, specifying the evidence.

## APPENDIX D—EXCERPT FROM TRANSCRIPT OF TESTIMONY

MR. O'SHEA: No, sir. The People have a rebuttal case.

THE COURT: Would you state what the rebuttal case is?

MR. O'SHEA: Well, Judge, initially, today I have a rebuttal of Police Officer O'Halloran under People versus Wise, a Court of Appeals case. I intend to call him regarding some substance of a statement Mr. French allegedly made to him.

THE COURT: What substance of a statement?

MR. O'SHEA: In particular, Judge, that he found the gun that he shot Bobby Schnell with.

THE COURT: Before I rule on whether or not that is appropriate rebuttal, do you wish to be heard, Mr. Peterson?

MR. PETERSON: Judge, we will object to that under People versus Rahming. I think it would be improper rebuttal. We will note our objection, if the Court pleases.

THE COURT: Noted. I believe that People versus Wise—do you have the citation?

MR. O'SHEA: Yes, 46 N.Y. 2nd 321.

THE COURT: —specifically deals with this situation, and being a later case must overrule, either expressly or by implication, People versus Rahming. Anything else the People are going to offer on rebuttal?

MR. O'SHEA: Well, Judge, at the—

THE COURT: Are you prepared to go ahead at this point?

MR. O'SHEA: I am prepared to go ahead with that officer. If my other witnesses are not available, I would like to go over until Monday morning for further rebuttal witnesses.

THE COURT: Well, we will see what— Let's take a

short recess. We will have this witness anyway.

(Short recess taken.)

(The defendant being present at counsel table, the jury enters courtroom; case duly recalled.)

MR. O'SHEA: The People call Officer O'Halloran to the stand.

THE COURT: Ladies and gentlemen of the jury, we are now at the rebuttal stage of this trial. This witness has been called by the People as a rebuttal witness. P.O. JOHN O'HALLORAN, called by the People, having been previously duly sworn, resumed the stand, was examined and testified further as follows:

DIRECT EXAMINATION BY MR. O'SHEA:

Q. Officer O'Halloran, you testified earlier in this case that the early morning hours of August 26th, I believe, that this defendant, Mr. French, was in your automobile on the way to the police station, is that correct?

A. Yes.

Q. You further testified that you gave him his Miranda warnings, as you relayed it in your earlier testimony, is that correct?

A. Yes.

Q. In addition to the conversation that you have already told us about in your earlier testimony, did you have any conversation with this defendant, Mr. French, regarding where the gun came from, sir?

A. Yes.

Q. Tell this jury, please, what you asked Mr. French regarding that and what he told you?

A. I asked him where he had received the gun from and he said he found it.

Q. I am sorry, he said what?

A. I asked him where he received the gun from and he said he found it.

MR. O'SHEA: Nothing further.

## APPENDIX E—EXCERPT FROM SUMMATION

Mr. French, that very night, within minutes told the police officer that he couldn't take the harassment any longer and that he shot his nephew. And again, the most important piece of evidence in this case is that he shot his nephew with a gun that he found. Completely opposite, completely opposite as to what he told you in this witness stand. And yet, will you disbelieve Police Officer O'Halloran who has no ax to grind in this case? Does he know the people involved and again, not testifying from memory, but you have a photocopy of his memo book that he made that very night and he states that he shot the complainant with a gun that he found.

We go back again to the duty as a jury or to discuss and decide who you can believe and I submit to you that the testimony of this defendant is testimony to get himself out from under. To save his neck and his wife's testimony is in support of that direction and that it flies in the fact of logic. That it flies in the fact of the story of John Schnell and Bobby Schnell and most importantly, it flies in the face even of what he told a neutral detached police officer that very night.

You remember Ed French's testimony on the stand. Admitted basically all of that statement, but denied that part which is so damaging to him. Ladies and gentlemen, looking at what Mr. French told the police that night and considering not only what's on that piece of paper, but the testimony of officer O'Halloran as to what his conversation was with the defendant. Both on direct and cross and on rebuttal when he was called back as a witness and I asked him, Officer, did Mr. French tell you that he shot his nephew with the gun he found and yes, he did. Do you remember there was some further examination by counsel, and I get up and say, Officer O'Halloran, is there any doubt in your mind who the "He" was in the gun, "He" found and Officer O'Halloran said absolutely not, his gun. A gun he found, the defendant denied that part. It was so damaging to him.

80-1386

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EDMUND FRENCH,

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-against-

THE PEOPLE OF THE STATE OF NEW YORK,

*Respondent.*

# RESPONDENT'S BRIEF

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# BRIEF FOR RESPONDENT

## QUESTIONS PRESENTED

1. Was there a denial of due process and equal protection under the Fourteenth Amendment at Petitioner's trial?

2. Has Petitioner raised a federal question?

On the basis of the following brief, the answer to both questions should be NO.

## TABLE OF CONTENTS


| | *Page* |
|---|---|
| Questions Presented | i |
| Table of Contents | iii |
| Index to Appendices | iii |
| Table of Authority | iv |
| Statement of the Case | 1 |
| Reasons for Denying the Writ | 3 |
| Conclusion | 6 |


## INDEX TO APPENDICES


| | |
|---|---|
| A — Excerpts from Transcript of Testimony (French-Cross, 93A) | 1a |
| B — Excerpts from Transcript of Testimony (French-Cross, 96A) | 2a |
| C — Excerpts from Transcript of Testimony (French-Cross, 100A) | 3a |
| D — Excerpts from Transcript of Testimony (O'Halloran-Rebuttal-Redirect, 120A) | 4a |
| E — Excerpts from Charge (Pages 4 and 5) | 5a |
| F — Point I of Appellant's Brief (Pages 44 through 53) | 6a |


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## TABLE OF AUTHORITY

*Statutes:*

USC Title 28, Section 1257 subd. 3..... 5

New York Criminal Procedure Law Section 710.30, subd. 1(a)..... 3

*Cases:*

*Chapman v. California,* 386 U.S. 18..... 2

*Gideon v. Wainwright,* 372 U.S. 335..... 5

*Harris v. New York,* 401 U.S. 222..... 5

*Jackson v. Denno,* 378 U.S. 368..... 3

*People v. Barrie,* 74 AD 2d 576..... 5

*People v. Crimmins,* 36 NY 2d 230..... 2

*People v. Greer,* 42 NY 2d 170..... 3

*People v. Ross,* 21 NY 2d 258..... 3

*People v. Travison,* 59 AD 2d 404 aff'd 46 NY 2d 758..... 4

*Street v. New York,* 394 U.S. 576, 89 S.Ct. 1354. 5

*Ungar v. Sarafite,* 376 U.S. 578, 84 S.Ct. 841... 5

## STATEMENT OF THE CASE

Prior to trial, and pursuant to New York Criminal Procedure Law Section 710.30, subdivision 1(a) (Full Text reproduced Petitioner's Appendix B—page 2a of petition — hereafter C.P.L.) notice was given that petitioner's statement to police, "I just couldn't take it any more, I had an argument with him and I shot him," would be used at trial. (Petitioner's Appendix C, page 3a of petition). Contemporaneous with the above statement, petitioner stated, "I found the gun" (Appendix C at 3a). However, this part of the statement was not specifically noticed.

Petitioner did not move for a hearing to test the voluntariness of the portion of the statement noticed prior to trial, nor was there objection to the unnoticed part as to its voluntariness, but only that it had not been noticed pursuant to the mandate of the statute.

The trial Court gave an immediate curative instruction to the jury advising them that the unnoticed portion of the statement was not evidence in the case (Petitioner's Appendix C, page 3a).

He had told police he had shot his nephew (Respondent's Appendix 1) and that he spoke to the police voluntarily (Respondent's Appendix 2). Petitioner was asked concerning the unnoticed, "I found the gun" and his initial reply was that it was not himself, but the victim, to whom petitioner referred to as finding the gun (Respondent's Appendix 3).

The petitioner rested his case and the People called Police Officer O'Halloran in rebuttal who testified that petitioner told him he had found the gun (Petitioner's Appendix D, page 4a) and that there was no doubt that the "he" referred to was petitioner himself (Respondent's Appendix 4).

The trial Court, in its main charge to the jury, instructed that:

" . . . any answers that were stricken from the record, you must treat as not part of the evidence either. You must treat it as if those answers had never been given." (Respondent's Appendix 5 and 6)

Petitioner's appeal of his conviction to the Appellate Division, Second Department of the New York State Supreme Court raised several issues. This petition seeks review of only the use of the non-noticed part of the statement. The thrust of the argument (Briefed Point attached as Respondent's Appendix 7-16) at the Appellated Division stressed the use of the statement on the People's direct case and only secondarily concerned the use of the statement on cross-examination, rebuttal and in summation. The present argument stresses the latter argument.

In affirming the conviction, the Court below cryptically cites *People v. Crimmins,* 36 NY 2d 230.*

The petitioner after his conviction had been affirmed was denied leave to appeal to the Court of Appeals.

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* *People v. Crimmins* is the oft cited New York authority on what is and what is not harmless error in both constitutional and nonconstitutional senses. *Crimmins* (id. at 237) adopts the rule of *Chapman v. California,* 386 U.S. 18 for harmless constitutional error. The rule for harmless nonconstitutional error is not so exacting, but common to both is that the doctrine of harmless error will not be considered at all ". . . unless the proof of defendant's guilt, without reference to the error, is overwhelming . . ." (*Crimmins,* id. at 237)

## REASONS FOR DENYING THE WRIT

### THE RESPONDENT'S FAILURE TO NOTICE A PART OF PETITIONER'S STATEMENT USED AT TRIAL PRESENTS NO FEDERAL QUESTION WHERE THE VOLUNTARINESS OF THE STATEMENT WAS NEVER QUESTIONED.

The error in not noticing a part of petitioner's statement at trial must now be conceded to have been error because that was the position of the Respondent in the court below in arguing that the error was harmless. In light of more detailed research, Respondent would not have taken such a position for absent a question of voluntariness there is no need for notice pursuant to New York Criminal Procedure Law Section 710.30, *People v. Greer,* 42 NY 2d 170, 178.

Petitioner correctly points out that there are factual similarities between *Greer* (id.) and the present case in that both involved a statement, part noticed and part unnoticed. However, the similarity ends when the action of the defendant in *Greer* (id.) in objecting to the admission of the unnoticed statement on grounds of it being involuntary, finds no counterpart in the case at bar.

The New York State Court of Appeals in *People v. Greer,* 42 NY 2d 170, 178 points out that:

> "(T)he obvious purpose of the statute (NY CPL Section 710.30) is to afford a defendant adequate time in preparing his case in respect to the voluntariness of a confession or admission (*People v. Ross,* 21 NY 2d 258, 262)."

This requirement is mandated by *Jackson v. Denno,* 378 U.S. 368 to afford a pre-trial determination of the voluntariness of a statement.

In the case at bar, a part of the contemporaneous statement, definitely exculpatory, "I just couldn't take it

any more, I had an argument with him and I shot him," was noticed pursuant to C.P.L. 710.30 but, as petitioner concedes, no pre-trial motion was made (Petition, p. 4). At the time of introduction of the unnoticed statement, the only objection was to the fact that the requirement of C.P.L. 710.30 was not followed. There is no indication in either the trial record, or in argument before the Appellate Division, that the use of the statement was challenged on grounds of it being involuntary. In fact, petitioner admitted at trial that he had voluntarily spoke to the police (Respondent's Appendix, p. 2). In the absence of any objection on the grounds of involuntariness, there is no sound reason why the point should be considered on appeal. *People v. Travison,* 59 AD 2d 404, 407 aff'd 46 NY 2d 758.

The above analysis clearly points to the fact that, absent a question of involuntariness, a failure to comply with the notice requirement of C.P.L. Section 710.30 is purely procedural and does not involve any constitutional deprivation.

In affirming petitioner's conviction, the Appellate Division cited *People v. Crimmins,* 36 NY 2d 230. Although *Crimmins* deals with both constitutional and non-constitutional harmless error, it is clear that in the context of the present record, the Appellate Division found that there was harmless error in a non-constitutional sense. In any event, the Appellate Division, in citing *People v. Crimmins* (id. at 241), would not have considered the harmless error doctrine in either constitutional or non-constitutional sense unless there was overwhelming proof of petitioner's guilt without reference to the claimed error.

Here we are dealing with the use of testimony which, but for the failure to give notice, would have been competent material and relevant. The trial court gave immediate instruction followed by additional instruction in the main

charge that the answer was stricken and could not be considered as evidence.

The petitioner's argument to the Appellate Division that he was deprived of a fair trial was predicated solely on the failure to abide by the notice requirement of a State Statute. Except for the citation of *Gideon v. Wainwright,* 372 U.S. 335 which dealt with a totally different constitutional issue, there was no indication that a challenge was being made to the constitutionality of failure to give notice, or how that related to a right to assistance of counsel.

The effect of the unnoticed statement on the direct case was removed by the trial Court's curative instruction. The use of the unnoticed statement to impeach petitioner was proper in light of *Harris v. New York,* 401 U.S. 222.

Petitioner's reliance on *People v. Barrie,* 74 AD 2d 576 is misplaced as a sttement of New York Law for there is no Court of Appeals holding that notice is required when a statement is used to impeach. The language to this effect in *Barrie* (id.) is clearly dicta. How the prosecution knows they intend to use a statement only during the defense case before they hear the defense case cannot be answered. It is therefore impossible in such a situation to give notice pursuant to C.P.L. Section 710.30.

Nothing in this record shows that a constitutional issue was ever tendered to the State Courts. *Ungar v. Sarafite,* 376 U.S. 578, 582, 84 S.Ct. 841. 846. If a constitutional issue was never tendered then, under U.S.C. Title 28 Section 1267 subd. 3, there is no power in this Court to consider the question, *Street v. New York,* 394 U.S. 576, 581-582, 89 S.Ct. 1354, 1360, and it should be assumed the omission was due to a want of proper presentation. Petitioner has failed to affirmatively show the contrary.

## CONCLUSION

**THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED IN ALL RESPECTS.**

Respectfully submitted,

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## APPENDIX "A"
## TRANSCRIPT OF TESTIMONY FRENCH-CROSS

Q. Do you recall his testimony that he walked up to you and had some conversation with you?

A. Yes.

Q. Is it your testimony now that you walked up to police officer?

A. Yes.

Q. Was it Officer O'Halloran—

A. I am not sure.

Q. Whoever that officer was, you told him that you shot your nephew or this man?

A. Yes.

Q. What else did you tell this officer?

A. I don't know that I told him anything. I don't know, I don't remember.

Q. What did he say to you?

A. I don't remember.

Q. What did he do to you, if anything?

A. I remember—the next thing I remember, he just asked me to raise my hands. Somebody said to me, "Where is the gun?" I said, "In my house." I raised my hands, he searched me down, and one of the officers put me in handcuffs and took me into the car.

Q. The officer, Mr. French, that searched you, did he have your hands up against the wall or something?

A. I believe so.

## APPENDIX "B"
## TRANSCRIPT OF TESTIMONY FRENCH-CROSS

Q. You think so?

A. I believe so, sir. I was so emotionally—

Q. Were you sober at that time?

A. Yes, sir.

Q. Did the policeman in any way threaten you, Mr. French?

A. No, sir.

Q. Did they in any way coerce you to talk to them?

A. I don't believe so, sir, no.

Q. They didn't put a gun to your head or say, "Talk to me."

A. No, they didn't.

Q. Did you voluntarily speak to the police officer when they came to the scene, sir?

A. Yes.

Q. Is it a fair statement, Mr. French—withdrawn.

When you got in the police car, how many police officers were in there, if you recall?

A. I think two.

Q. You had a conversation with those police officers?

A. I believe so.

Q. Mr. French, did you tell the police officers that your nephew and you have been having a problem for about six months?

## APPENDIX "C"
## TRANSCRIPT OF TESTIMONY FRENCH-CROSS

. . . WHY YOU SHOT Bobby Schnell; could he have been correct if that's what yo did tell him?

A. If he said that, I wouldn't say the man would come up here and lie—

Q. Would you please answer my question?

A. I am trying to the best of my ability. What I told the man, what he would say, I don't think he would come in here and lie, but I don't remember saying words to that effect.

Q. But you might very well have said that, is that right?

A. It's a possibility. I don't think so, but it—

Q. Mr. French, lastly, sir, that same night in the police car, did you tell Officer O'Halloran that you shot Bobby Schnell because you couldn't take the harrassment any longer, and that you shot him with a gun that you found?

A. I didn't find that gun. Bobby had found that gun.

Q. Sir, my question is did you tell the police—

MR. PETERSON: That's being responsive.

MR. O'SHEA: That's not being responsive.

THE COURT: Mr. O'Shea, first of all, stand back. Second of all, the answer is not responsive. Read the question back.

(Question read back).

A. No, sir.

## APPENDIX "D"
## TRANSCRIPT OF TESTIMONY
## O'HALLORAN-CROSS

Q. Cursing at his wife or words to that effect?
A. Are you asking me?
Q. Cursing at his wife or words to that effect?
A. Yes.
Q. He couldn't take it any longer or words to that effect?
A. Yes.
Q. He shot Schnell with the gun he found, is that correct? He?
A. That the defendant found.
Q. Did you write the word "he," sir?
A. Yes, sir.
MR. CRECCA: Thank you, Officer.

REDIRECT EXAMINATION BY MR. O'SHEA:
Q. Officer, when he told you that he shot him with a gun that he found, was there any doubt in your mind who the "he" was?
MR. CRECCA: Objection.
THE COURT: Overruled.
A. Not at all.
Q. Who was the "he" that he was talking about?
A. Himself.
Q. Officer, did you at any time ask Mr. French to sign this statement? Withdrawn.

## APPENDIX "E"
## CHARGE

Occasionally during the trial a lawyer has objected to a question put to a witness by his opponent and I have sustained the objection and the witness was not permitted to answer the question. Obviously an unanswered question is not evidence and you may not speculate as to what answer the witness may have given had it been legally permissible for the witness to answer that question. Also, any answers that were stricken from the record, you must treat as not part of the evidence either. You must treat it as if those answers had never been given.

Now, I tell you that evidence of the good character of the defendant, if you find it credible may alone raise a reasonable doubt as to his guilt. Now, I'm sure that you could see that one of your most important duties is to decide on the credibility that is the believability of what the various witnesses have told us. This is not necessarily an easy task and there is no magic formula that I can give you to make it any easier for you, but there are some factors that I would like to suggest that you take into consideratin in deciding what testimony you are going to believe.

For example, consider the probability or improbability of the testimony of each witness. Consider also the opportunity eac witness had to see or hear the things that he has described for you wat it in a good position? Was it the sort of thing that is likely to make . . .

## APPENDIX "F"
## POINT I OF BRIEF

The right of the accused to a fair trial is the very cornerstone upon which rests our entire system of criminal justice.

Basic to the concept of a fair trial is the right of the accused to be represented by counsel. Moreover, the right to counsel necessarily includes more than simply having an attorney physically pre;sent during the course of the trial. Mere formalistic adherence to the basic tenet enunciated in Gideon v. Wainwright (372 U.S. 335) that the accused in a criminal case is entitled to the assistance of counsel, has not been condoned. In fact that principle has been greatly expanded by subsequent cases as well as legislative decrees.

The Criminal Procedure Law, §710.30 provides as follows:

> 1. Whenever the people intend to offer at a trial (a) evidence of a statement made by a defendant to a public servant, which statement if involuntarily made would render the evidence thereof suppressible upon motion pursuant to subdivision three of §710.20 . . . . they must serve upon the defendant a notice of such intention, specifying the evidence intended to be offered.
>
> 2. Such notice must be served within fifteen days after arraignment and before trial, and upon such service the defendant must be accorded reasonable opportunity to move before trial, pursuant to subdivision one of §710.40, to suppress the specified evidence. For good cause shown, however, the court may permit the people to serve such notice thereafter and in such case it must accord the defendant reasonable opportunity thereafter to make a suppression motion.
>
> 3. In the absence of service of notice upon a defendant as prescribed in this section, no evidence of a kind specified in subdivision one may be received against him

upon trial unless he has, despite the lack of such notice, moved to suppress such evidence and such motion has been denied and the evidence thereby rendered admissible as prescribed in subdivision two of §710-70.

The Disclosure Form and Notice Pursuant to CPL §710.30 supplied to counsel for the defendant, a copy of whic is annexed hereto and made a part hereof, indicated that the people intended to offer as evidence during the trial na oral statement made by the defendant to Police Officer John O'Halloran on August 26, 1979. The substance of the statement is as follows:

"Defendant stated Schnell was his nephew. They had been arguing on and off for 6 months. Schnell had been harrassing him and his wife. He couldn't take the harrassment any longer so he shot Schnell."

During the course of the People's direct examination of Police Officer O'Halloran the following testimony was elicited:

Q. What did you do, if anything, at that time?

A. I approached Mr. French and I asked him what had happened.

Q. Where was Mr. French at that time?

A. He was standing on the corner of Midland and Moreland.

Q. Was anybody with him?

A. Not at that time, no.

Q. You approached him?

A. Yes, I did.

Q. Tell the jury just what happened when you approached him.

A. I approached him and asked him what had happened, and he stated to me he just had an altercation with the complainant, and it's been an on-going dispute, more

or less, for the last six months, and the complainant had been in his house that night, had an argument with his wife and destroyed some property. He says I just couldn't take it any more, I had an argument with him and I shot him.

Q. Did you further question—you further have any conversation with him?

A. Yes, I did.

Q. What did that involve?

A. I had asked him where the gun was.

Q. Did he respnod?

A. No.

Q. What happened next?

A. A woman whom I now know, I believe it's his wife, Helen, directed Officer Zarrilli to his address, 216 Moreland Avenue.

Q. You mean the defendant's address?

A. Mr. French's address and they had gone upstairs and in a matter of seconds they came out and Officer Zarilli handed me a gun.

Q. What did you do with that gun?

A. I secured the gun in my pants pocket.

Q. What did you do with Mr. French, if anything?

A. I had asked Mr. French where he had got the gun.

Q. What did he tell you?

A. He said he found it.

MR. PETERSON: Objection, Judge.

THE COURT: You asked whom?

THE WITNESS: Defendant

THE COURT: Overruled.

MR. PETERSON: May we have a side bar.

(Whereupon a discussion was held off the record at the side bar outside the presence of the jury).

MR. CRECCA: Judge, if the Court pleases, the defense will move to strike the testimony of this gentleman, especially the latter portion of same.

THE COURT: The entire testimony?

MR. CRECCA: The latter portion.

THE COURT: The question with regard to or the answers allegedly made by the defendant to the effect that he found the gun, that will be stricken, the jury is instructed to treat that answer as if it had never been given. It is not part of the evidence in this case (pp. 197-199).*

The law regarding the requirement that the people supply to the defense pretrial notice of their intention to use a defendant's statements as evidence against him has been clearly stated on numerous occasions and is founded upon considerations of fairness and the requirement that the defendant be given a fair trial.

Although it is likely that a defendant will be aware of the People's intention to use a pretrial statement made by him as evidence against him at trial, there exists a reasonable probability of his unawareness of such statement in some instances and an even greater probability that his own counsel will be unaware of the intended use of such a statement. (of Denzer, Practice Commentary, McKinney's Consolidated Laws of New York, Book 11A, CPL 710.30, p. 238). Thus, it is apparent that the rationale for §710.30 is to inform defense counsel, in advance of the existance of any statements made by his client in order to insure the existence of a fair trial.

In People v. Quarles, 44 Misc. 2d 955, 960, the Court after a most scrupulous examination of past cases, came to the conclusion that the defeendant is entitled to have his attorney examine any statements made by his client to a public servant. The failure to permit this would serve to deprive the defendant of his right to a fair trial.

In People v Chirico, 61 Misc. 2d 157, 162 the Court reasoned that counsel for the defendant must come to a decision, during the preparation of his case, as to whether or not to put the defendant on the stand. If a copy of any statement made by the defendant is not made available to counsel for the defendant, said counsel is not in a position

to make a reasoned and intelligent decision. Fairness and justice, and defendant's fundamental right to a fair trial demand that a pretrial request for a copy of any sttement made by a defendant be granted.

In People v. Utley, 77 Misc. 2d 86, 94, the Court indicated the importance of providing defense counsel with pretrial notice of any oral statements made by the defendant. Therein the Court stated, "It would seem that disclosure as to oral statements is more fundamental to due process and the right to counsel . . . . The slightest statement uttered during the initial encounter on the street . . . with other proven facts will result in evidence of the most catastrophic dimensions. The most illustrious counsel cannot adequately prepare a defense without knowing what his client has said."

Thus, independent of considerations of challenging the voluntariness of the defendant's statements, considerations of fair play and due process demand that a defendant be apprised before trial of any incriminating statements intended to be offered against the defendant (People v. Briggs, 38 N.Y. 2d, 319, 323).

The cases previously cited all dealt with situations wherein the defense counsel made a pretrial demand for a copy of any statements made by the defendant. In the case herein, defense counsel was provided by the People with a voluntary disclosure from containing notice pursuant to §710.30 of the Criminal Procedure Law. The difference is of no consequence to the issue herein.

The position of the People was that §710.30 does not require that the notice given contain a verbation account of that which was stated by the defendant. In so arguing the prosecutor was certainly correct. However, the statute does require that the People serve notice "specifying the evidence intended to be offered." The word "specify" means "prcise" the use of that word requires a detailed statement of that which was said by the defendant to the

police officer. The notice must be accurate and complete. (People v. Utley, supra, p. 95; People v. Chirico, supra, p. 162). The failure of the People to include within the notice that which is significant renders said notice deficient to that extent as it serves to frustrate the defendant's opportunity to prepare an appropriate defense. (People v. Ludolph, 63 A.D.2d 77, 80-81).

The failure of the People to provide the defenses counsel with notice that the defendant is alleged to have stated to the officer that he had found the gun certainly was a significant omission and one which is neither permissible nor to be construed as harmless error.

The law is now clear that the requirement that the defendant be given pre-trial notice of any statements is not applicable to those of the defendant's statements which the People intend to use merely for impeachment purposes. In Harris v. New York, 401 U.S. 222, the United States Supreme Court held that a defendant who takes the stand may be impeached by a prior inconsistent statement, even though such statement may be inadmissible in the People's case in chief because of a failure to administer the warnings required by Miranda v. Arizona (384 U.S. 436), as long as the statement otherwise satisfied legal standards as to trustworthiness.

The decision in the Harris case does not hold, however, that because such statement may be inadmissible on the People's direct case, that the defendant may not have pretrial disclosure of the contents of such statement. To permit the People to withhold such disclosure because they acknowledge that the statement was obtained in violation of the defendant's rights and then permit its use for the purpose of impeachment without first advising counsel for the defendant of its existence would give to the People an advantage based upon its own misconduct. Such has never been the law of this jurisdiction nor of any other state. (People v. DiMatteo, 80 Misc. 2d 1029, 1031).

It has long been the law of this State that disclosure should not be denied solely to give the prosecution a tactical advantage or to have criminal trials conducted on the basis of "trial by ambush." (People v. DiMatteo, supra, p. 1031; People v. Utley, supra, p. 96).

It should be noted at this time that when the People's witness testified on direct that the defendant herein stated he had "found the gun," the Court first overruled the objection of defense counsel but after a side bar conference sustained the objection and instructed the jury to treat that portion of the statement as if it were never given and that it was not evidence in the case (pp. 198-199 of the transcript).

However, the ruling of the Court does not cure the defect created by the failure of the People to disclose accurately to the defense counsel the contents of the statement made to the police officer. Within the context of the facts herein, the People's omission was of the greatest import. Being unaware of the existence of the alleged statement, the defense had committed itself during its opening statement to the jury to the strategy of having the defendant take the stand and testify in his own behalf. The entire strategy and preparation of the defendant's case was made in reliance upon that information which was contained within the notice served upon the defense by the People pursuant to the requirement of CPL §710.30. Had the existence of the entire statement been made available to the defense as required by law, the defense would have had an adequate opportunity to consider the wisdom of having the defendant testify in his own behalf and thereby subject himself to cross-examination regarding the statement in question upon the issue of credibility.

The rationale for the notice requirement was most aptly stated in *People v. Briggs,* supra, p. 324.

"The issue is not a trivial or merely technical one. Prior statements, especially oral ones, to a police officer, are ac-

corded high credibility by fact finders, jury or Judges. Whether in fact they were made, whether they were voluntary, and the precise form which they took may be crucial to the determination of innocence or guilt. To deprive defendants in criminal matters unnecessarily of an advance opportunity to investigate the facts and circumstances is neither fair nor conducive to establishing the truth through the adversary process with the assistance of counsel. A cavalier treatment of the statute's requirements frustrates its ends."

Of equal applicability to the facts here was the determination that "truth is best revealed by a decent opportunity to prepare in advance of trial. Where the liberty and reputation of a defendant are in jeopardy, every reasonable opportunity and facility should be afforded him in the preparation of his case." (People v. Utley, supra, p. 96)

The failure of the People to comply with the requirements of §710.30 of the Criminal Procedure Law served to deprive the defendant of his right to a fair trial.